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No. 97-

In The Supreme Court of the United States

OCTOBER TERM 1997

ASA G. SWANNER, JR.
and LINDA F. SWANNER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Memorandum of Plea Agreement in the criminal case and the Stipulation of Compromise Settlement and Order approving same in the civil case, which were intended to resolve all criminal and civil issues in one universal agreement, were violated by the actions of the Internal Revenue Service in filing tax liens and notices of intent to levy and in fact seizing and attempting to seize Petitioners' property.

II. Whether the tax and penalties sought by the Government through the Internal Revenue Service violate the double jeopardy and excessive fines clauses of the United States Constitution where the Petitioners were previously sanctioned in the criminal case and in the companion civil case.

PARTIES AND CORPORATE DISCLOSURE

The undersigned counsel of record certifies that the persons and entities listed below are parties in this proceeding.

Petitioners:

Asa G. Swanner, Jr. and Linda F. Swanner are natural persons residing in the State of North Carolina.

Respondent:

United States of America by and through the office of the United States Attorney for the Eastern District of North Carolina.

TABLE OF CONTENTS

page:

QUESTIONS PRESENTED i

PARTIES AND CORPORATE DISCLOSURE ii

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION

I. THE MEMORANDUM OF PLEA AGREEMENT AND STIPULATION OF COMPROMISE SETTLEMENT WERE MEANT TO BE READ TOGETHER IN ORDER TO RESOLVE ALL CRIMINAL AND CIVIL ISSUES BETWEEN THE PETITIONERS AND THE GOVERNMENT IN ONE UNIVERSAL AGREEMENT WHICH BOUND THE

GOVERNMENT, INCLUDING THE INTERNAL REVENUE SERVICE, AND THEREFORE THE ACTIONS OF THE INTERNAL REVENUE SERVICE BREACHED THE MEMORANDUM OF PLEA AGREEMENT AND THE STIPULATION OF COMPROMISE SETTLEMENT APPROVED BY COURT ORDER IN THE INSTANT CASE, AND THE DISTRICT COURT ERRED IN DENYING THE PETITIONERS' MOTION IN THE CAUSE AND REFUSING TO ALLOW INJUNCTIVE RELIEF, AND THE COURT OF APPEALS ERRED IN DECLINING TO REVERSE 7

II. THE ACTIONS OF THE INTERNAL REVENUE SERVICE IN SEEKING ADDITIONAL TAX AND PENALTIES OVER AND ABOVE THE SANCTIONS IMPOSED IN THE CRIMINAL CASE AND THE CIVIL FORFEITURE CASE VIOLATE THE DOUBLE JEOPARDY PROTECTION AGAINST MULTIPLE PUNISHMENT FOR THE SAME OFFENSE UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND VIOLATE THE PROSCRIPTION AGAINST EXCESSIVE FINES

UNDER THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION 15

CONCLUSION 18

TABLE OF AUTHORITIES

cases

page

Austin v. United States, 509 U.S. 602,
125 L.Ed 2d 488, 113 S.Ct. 2801 (1993).....12, 13, 18

Bob Jones Univ. v. Simon, 416 U.S. 725,
94 S.Ct. 2038, 40 L.Ed.2d 496 (1974).....14

Department of Revenue of Montana v.
Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937
128 L.Ed 2d 767 (1994) 16, 17

Enochs v. Williams Packing and Navigation Co.,
370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed. 292 (1962) 14

Erickson v. U.S., 780 F.Supp. 733
(W.D. WA 1990) 14

Hudson v. United States, Supreme Court
No. 96-976 17

Mabry v. Johnson, 467 U.S. 504, 509,
81 L.Ed. 2d 437, 104 S.Ct. 2543 (1984).....10

Margalli-Olvera v. Immigration and
Naturalization Service, 43 F.3d 345,
351 (8th Cir. 1994) 10, 11

Santobello v. New York, 404 U.S. 257,
92 S.Ct. 395, 30 L.Ed. 2d 427 (1971).....11

Thomas v. Commissioner, 62 F.3d 97
(4th Cir. 1995).....12, 13

cases

page

Thomas v. Immigration and Naturalization Service, 35 F.3d 1332 (9th Cir. 1994) 11

United States v. Anderson, 970 F.2d 602 (9th Cir. 1992) 12

United States v. Britt, 917 F.2d 353, 359 (8th Cir. 1990) 10

United States v. Carter, 454 F.2d 426 (4th Cir. 1972) 11

United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed 2d 487 (1989) 16

United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986) 11

United States v. Hudson, 92 F.3d 1026 (10th Cir. 1996) 17

United States v. Jureidini, 846 F.2d 964 (4th Cir. 1988) 12

United States v. Van Thournout, 100 F.3d 590 (8th Cir. 1996) 10, 11

Constitution and Statutes

Title 26 U.S.C. § 7421 ..... 9, 14

Title 28 U.S.C. § 1254(1) 1

Constitution and Statutes

page

U.S. Constitution, 5th Amendment 15, 16

U.S. Constitution, 8th Amendment 15, 18

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the decision of the United States District Court for the Eastern District of North Carolina for which review is sought is United States v. Swanner, No. 96-1195 decided by unpublished opinion on August 29, 1997. Said opinion of the United States Court of Appeals for the Fourth Circuit is reproduced in the Appendix to this Petition (App. 1).

Said opinion affirmed the January 16, 1996 order of the District Court for the Eastern District of North Carolina denying the petitioners' motion in the cause. (No. 92-93-CIV-4-F) (App. 9).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was filed on August 29, 1997. Jurisdiction of this court to review the decision of the United States Court of Appeals for the Fourth Circuit is invoked under Title 28 U.S.C. § 1254(1). (App. 15).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns criminal conduct under illegal gambling businesses, Title 18, U.S.C. § 1955 and civil forfeiture under Title 18, U.S.C. § 981. It also includes the double jeopardy clause of the Fifth Amendment of the United States Constitution and the excessive fine clause of the Eighth Amendment of the United States Constitution. They are reprinted in the Appendix as follows:

1. Title 18 U.S.C. § 1955(a) (App. 16).
2. Title 18 U.S.C. § 981(a) (App. 16).
3. Amendment V, U.S. Constitution (App. 17).
4. Amendment VIII, U.S. Constitution (App. 17).

STATEMENT OF THE CASE

Pursuant to an investigation by the Internal Revenue Service, the complaint in this case was filed on July 2, 1992 for forfeiture of certain property of the petitioners for illegal gambling operations alleged to have occurred in the Eastern District of North Carolina. The petitioners were subsequently indicted criminally on August 2, 1994, second superseding indictment on February 7, 1995. Extensive plea negotiations were conducted by counsel for the petitioners and counsel for the Government. On April 10, 1995 a memorandum of plea agreement was entered in the case of Asa G. Swanner, Jr., and a stipulation of compromise settlement was entered into between the petitioners and the Government in the instant action.

The memorandum of plea agreement was executed by the petitioner Asa G. Swanner, Jr., the United States, and counsel, and approved by United States District Court Judge Malcolm J. Howard. Pursuant to said memorandum of plea agreement, Mr. Swanner entered a plea of guilty to Count One of the indictment, and the remaining counts were dismissed. Mrs. Swanner was placed in a pretrial diversion program, and her case ultimately dismissed. The memorandum of plea agreement, among other things, contained the following provisions:

a. The defendant agreed not to contest the civil forfeiture in U.S. v. $92,762.00 in U.S. Currency, et al, docket number 92-93-CIV-4-F, consistent with the terms of a stipulation of compromise settlement between the parties;

b. The Government agreed that the USA/EDNC would not further prosecute the defendant for conduct constituting the basis for the indictment, and that it would comply with all provisions of the related civil forfeiture agreement in U.S. v. $92,762.00 in U.S. Currency, et al, docket number 92-93-CIV-4-F, consistent with the terms of the stipulation of compromise settlement between the parties in that proceeding; and

c. The Government agreed that the USA/EDNC would not share any information provided by the

> defendant pursuant to the memorandum of plea agreement with other State or Federal prosecuting entities except upon their agreement to be bound by the terms of said agreement.

Of crucial importance was a footnote at the bottom of page 1 of the plea agreement which read:

> "In US v. $92,762.34 IN U.S. CURRENCY; et al, DKT.# 92-93-CIV-4-F, and at the request of the co-defendants, Asa G. Swanner, Jr. and Linda Swanner, the parties have entered into a stipulation of compromise settlement in order to obtain a resolution of all criminal and civil issues regarding these defendants in one universal agreement. In so doing, the co-defendants voluntarily waive any and all double jeopardy issues with regard to that stipulation and this criminal plea agreement, if any."

On that same date, April 10, 1995, a stipulation of compromise settlement was entered in the instant civil case and executed by the Government, the petitioners, and petitioners' counsel. Pursuant to the terms of the stipulation of compromise settlement, the petitioners agreed to the forfeiture of the currency involved and a substantial amount of property, for a total value of approximately $300,000.00. The Government agreed to dismiss all civil and criminal forfeiture actions regarding the remaining defendant properties in this action and the related criminal action, and to

seek no additional civil or criminal forfeitures against the petitioners' properties based on the facts which formed the basis of the civil forfeiture proceeding and the related indictment. In a footnote on the first page of the stipulation of compromise settlement, it was noted:

> "This action is directly related to USA v. Asa G. Swanner, Jr., case number 4:94-CR-56-1-H1, and the terms of this stipulation of compromise settlement are incorporated by reference into the plea agreement between the United States and the principal defendant Asa G. Swanner, in connection with the second superseding indictment."

On April 20, 1995 an order and judgment were entered by Judge James C. Fox dismissing the matter pursuant to the stipulation of compromise settlement. An amended order was entered on May 26, 1995 and re-filed on July 10, 1995 causing the forfeiture of the property agreed to under the stipulation of compromise settlement. The amended order also provided that the Government would dismiss all civil and criminal forfeiture actions regarding the remaining defendant properties in this civil action and the related criminal action and that the Government would seek no additional civil or criminal forfeitures against these properties or any others in connection with these petitioners based on the facts which formed the basis of the civil forfeiture proceeding and the related indictment, and that the Government would withdraw all lis pendens regarding all other defendant real properties. The amended order further provided that the United States would comply with all terms of the related plea agreement with Asa G. Swanner, Jr. in the criminal action. The amended order was re-filed on July 10, 1995 because it was on that date that Mr. Swanner was sentenced in the criminal action, that judgment being entered

on July 10, 1995. Judge Howard sentenced Mr. Swanner to fourteen (14) months imprisonment and fined him $15,000.00.

After Mr. Swanner had gone off to prison, the Internal Revenue Service again became involved. They wrote to the petitioners on August 7, 1995 giving formal notice of an intent to levy (seize) property for tax allegedly owed, including penalties and interest. Notices of federal tax liens were filed on October 31, 1995. Notices of levy were filed on November 20, 1995.[1] The amount claimed by the Internal Revenue Service for 1989 included a balance due for taxes in the amount of $76,202.00 plus interest and penalties. The amount claimed by the Internal Revenue Service for 1990 included a balance due for taxes in the amount of $113,372.00 plus penalties and interest. The total amount claimed by the Government with penalties and interest was over $600,000.00. The amounts were determined from lottery records seized in the civil proceeding and the criminal case. The Government began seizing and continued to seize rental fees owed to the petitioners from Steamers Restaurant and New Dimensions Beauty Salon. Agents for the Government told the claimant that they intended to begin foreclosure proceedings in the near future on property owned by the petitioners.

On December 14, 1995 the petitioners filed a motion in the cause asking the District Court to enjoin the Government from any further forfeiture or seizure of the petitioners' property in that the actions of the Internal Revenue Service violated the memorandum of plea agreement in the criminal case, the stipulation of compromise settlement

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[1]It should be noted here that the only years in dispute are 1989 and 1990.

in the civil case, and the court orders in the instant case approving the stipulation of compromise settlement. By order dated and filed January 16, 1996 the claimants' motion in the cause was denied and the case dismissed.

The claimants duly appealed assigning error. By order filed August 29, 1997 the Fourth Circuit Court of Appeals affirmed.

REASONS FOR GRANTING THE PETITION

I. THE MEMORANDUM OF PLEA AGREEMENT AND STIPULATION OF COMPROMISE SETTLEMENT WERE MEANT TO BE READ TOGETHER IN ORDER TO RESOLVE ALL CRIMINAL AND CIVIL ISSUES BETWEEN THE PETITIONERS AND THE GOVERNMENT IN ONE UNIVERSAL AGREEMENT WHICH BOUND THE GOVERNMENT, INCLUDING THE INTERNAL REVENUE SERVICE, AND THEREFORE THE ACTIONS OF THE INTERNAL REVENUE SERVICE BREACHED THE MEMORANDUM OF PLEA AGREEMENT AND THE STIPULATION OF COMPROMISE SETTLEMENT APPROVED BY COURT ORDER IN THE INSTANT CASE, AND THE DISTRICT COURT ERRED IN DENYING THE PETITIONERS' MOTION IN THE CAUSE AND REFUSING TO ALLOW INJUNCTIVE RELIEF, AND

THE COURT OF APPEALS ERRED IN DECLINING TO REVERSE

The Petitioners respectfully contend that the denial of their motion in the cause allows the Government to continue to penalize them for actions that were supposed to have been laid to rest in April, 1995. To allow the Internal Revenue Service to file notices of intent to levy (seize) property, to file liens on their property, and to in fact seize monies and rents and threaten to foreclose on property owned by the petitioners is a direct violation of the plea agreement in the criminal case and of the stipulation of compromise settlement and approving court order in the civil case at bar. By pleading guilty to Count One of the indictment pursuant to the memorandum of plea agreement, Mr. Swanner agreed to not contest the civil forfeiture consistent with the terms of the stipulation of compromise settlement in the instant case. Pursuant to the stipulation of compromise settlement he forfeited cash and property in an amount of approximately $300,000.00. He also received an active prison sentence of fourteen (14) months and a $15,000.00 fine.

Of particular importance is the relatedness of the criminal case and the civil case at bar. In the memorandum of plea agreement, the footnote on the first page stated as follows:

> In US v. $92,762.23 IN U.S. CURRENCY; ET AL, DKT.# 92-93-CIV-4-F, and at the request of the co-defendants, Asa G. Swanner Jr. and Linda Swanner, the parties have entered into a stipulation of compromise settlement in order to obtain a resolution of all criminal and civil issues regarding these defendants in one universal

> agreement. In so doing, the co-defendants voluntarily waive any and all double jeopardy issues with regard to that stipulation and this criminal plea agreement, if any.

In the stipulation of compromise settlement approved by the court, the footnote on the first page stated:

> This action is directly related to USA v. Asa G. Swanner, Jr., Case No. 4:94-CR-56-1-H1, and the terms of this stipulation of compromise settlement are incorporated by reference into the plea agreement between the United States and the principle defendant, Asa G. Swanner, in connection with the second superseding indictment.

It is respectfully contended that the memorandum of plea agreement and stipulation of compromise settlement were meant to be read together in order to resolve all criminal and civil issues between the Swanners and the Government in one universal or global agreement.

The Fourth Circuit Court of Appeals found that the District Court denied relief on three grounds, finding (1) that the Swanners' failure to pay taxes were separate and distinct from operation of the gambling business, (2) that enforcement of tax liens is not a criminal forfeiture, and (3) that the Internal Revenue Service had been specifically excluded from the operative provision of the settlement agreement. Additionally, the Government raised for the first time on appeal the jurisdictional bar of the Anti-Injunction Statute, 26 U.S.C. § 7421. The Fourth Circuit held that insofar as relief sought by the petitioners may be read to question whether they owed unpaid taxes and penalties, the Anti-Injunction Act applied since the proper remedy would have been to pay the

questioned amount and bring a suit for a refund. This totally ignores the fact that the Swanners have already paid over $300,000.00 to the Government and do not have funds to pay the questioned amount. The Fourth Circuit Court went on to hold that insofar as the relief may be understood as a request to declare the liens invalid because of the plea agreement and settlement agreement, it agreed with the District Court's findings and therefore affirmed.

The finding that the petitioners' failure to pay taxes was separate and distinct from the operation of the gambling business is totally without foundation. The criminal indictment, the civil forfeiture case, and the tax proceeding are entirely related, inter-related, and inextricably entwined to the end result that the Internal Revenue Service should be bound by the memorandum of plea agreement and the stipulation of compromise settlement. The common agency behind the criminal prosecution and the civil forfeiture case as well as the attempt to collect additional taxes, penalties, and interest, is the Internal Revenue Service. The plea agreement specifically stated that the parties intended to resolve all criminal and civil issues regarding the defendants in one universal agreement.

A plea agreement, while contractual in nature and generally governed by ordinary contract principles, is more than a mere contract between two parties. Instead, a plea agreement must attend to certain constitutional safeguards to ensure a defendant receives the performance and protections he is due. See United States v. Van Thournout, 100 F.3d 590 (8th Cir. 1996), citing United States v. Britt, 917 F.2d 353, 359 (8th Cir. 1990). Allowing the Government to breach a promise that induced a guilty plea violates due process. Margalli-Olvera v. INS, 43 F.3d 345, 351, (8th Cir. 1994), citing Mabry v. Johnson, 467 U.S. 504, 509, 81 L.Ed. 2d 437, 104 S.Ct. 2543 (1984). Moreover, with

respect to federal prosecutions, the courts' concerns run even wider than protection of the defendant's individual constitutional rights-- to concerns for the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government. United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986).

In United States v. Van Thournout, 100 F.3d 590 (8th Cir. 1996), it was held that the plea agreement in the Federal District Court in Wyoming could bind the Government in the Federal District Court of Iowa. In United States v. Harvey, 791 F.2d 294 (4th Cir. 1986), it was held that a plea agreement in the Eastern District of Virginia barred subsequent prosecution in South Carolina, and it was noted that it is the Government at large, not just specific United States Attorneys or Districts, that are bound by plea agreements negotiated by agents of the Government. Harvey quoted United States v. Carter, 454 F.2d 426 (4th Cir. 1972), which vacated the defendant's conviction and remanded the case for an evidentiary determination of whether the plea agreement was breached for his cooperation in a Washington, D.C. case. Subsequent to the preparation of the opinion, the United States Supreme Court decided Santobello v. New York, 404 U.S. 257, 92 S.Ct. 395, 30 L.Ed. 2d 427 (1971), which the Fourth Circuit deemed additional support for the result reached.

Other circuit courts have followed this lead in binding Government agents to plea agreements entered by the Government. See Margalli-Olvera v. Immigration and Naturalization Service, 43 F.3d 345 (8th Cir. 1994) (Immigration and Naturalization Service held to be bound by plea agreement entered into by United States Attorney's office); Thomas v. Immigration and Naturalization Service, 35 F.3d 1332 (9th Cir. 1994) (United States Attorney has

implied actual authority to bind the Government, including INS, as part of a plea agreement not to seek deportation); United States v. Anderson, 970 F.2d 602 (9th Cir. 1992) (plea agreement by Government bound parole commission). See also United States v. Jureidini, 846 F.2d 964 (4th Cir. 1988) (both the United States Attorney and the Parole Commission are agents of the Government and are therefore bound by what are, in effect, Government promises).

Based upon the foregoing, the Swanners respectfully urge that the total facts and circumstances in this case require adherence to the plea agreement which incorporates the stipulation of compromise settlement, which in turn binds all agencies of the Government, including the Internal Revenue Service.

Petitioners also disagree with the lower courts' holdings that enforcement of tax liens is not a criminal forfeiture. Under the facts and circumstances of this case it is a distinction without a difference. The District Court relied upon the case of Thomas v. Commissioner, 62 F.3d 97 (4th Cir. 1995), for the implied premise that tax penalties are not "forfeitures". Thomas v. Commissioner is clearly distinguishable from the case bar. Thomas v. Commissioner involved an excessive fine argument under the Eighth Amendment where the Internal Revenue Service was attempting to enforce tax liability after defendant Thomas had been convicted of drug conspiracy and paid the Government $65,000.00 from the proceeds of a forfeiture. The Fourth Circuit held in Thomas v. Commissioner that the tax liability was remedial rather than punitive and therefore the excessive fines clause was not implicated, and that in any event there was no basis for concluding that the tax sanction was excessive. Both Thomas v. Commissioner and the District Court in the instant case cited Austin v. United States, 509 U.S. 602, 125 L.Ed. 2d 488, 113 S.Ct. 2801 (1993), which

held that it was possible for forfeitures and fines in civil cases to be regarded as punitive exactions, thus implicating the Eighth Amendment's prohibition against excessive fines. Nowhere did Austin or Thomas v. Commissioner state that tax penalties are not forfeitures. The issue turns not on what label is placed on the penalty but whether the effect of the penalty is punitive. It is alleged that the actions of the Internal Revenue Service in the instant case are punitive in nature.

The District Court order further based its decision on footnote 2 on page 6 of the stipulation of compromise settlement (App. 10), as evidence of the parties' understanding that the agreement would not bind the Internal Revenue Service. Claimants disagree and would urge that a close reading of footnote 2 is that the agreement would in no way bind actions of other federal agencies that are "unrelated to these forfeiture proceedings". The actions of the Internal Revenue Service challenged here are certainly related to the forfeiture proceedings which are directly related to the criminal indictment. The Internal Revenue Service, through Agent S. Kevin Greene, was the moving force behind the civil forfeiture case filed herein. The Internal Revenue Service was also the moving force behind the criminal indictment. Both the forfeiture proceedings and the criminal indictment related to the Swanners' illegal gambling activity, and the Internal Revenue Service's actions now challenged relate to alleged taxes, interest, and penalties associated with the failure to report income from this same gambling activity. The years at issue, 1989 and 1990, are specifically covered in the indictment, and the civil action herein. The tax deficiency computed by the Internal Revenue Service for the year 1989 was $76,202.00 and for 1990 was $113,372.00. The other amounts alleged to be due over and above those amounts are for interest and penalties. The basis the Internal Revenue Service used at arriving at these figures were the

lottery records and other properties seized in the civil action herein and the subsequent criminal case. Therefore, the actions of the Internal Revenue Service were totally related, and the exclusion relied upon by the District Court and the Court of Appeals is not applicable.

Finally, it is respectfully contended that the Anti-Injunction Act, 26 U.S.C. § 7421(a) is not applicable to the case at bar. Section 7421(a) of the Internal Revenue Code, commonly referred to as the Anti-Injunction Act ("the Act"), states in pertinent part that

> ...no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

26 U.S.C. §7421(a). The Act ensures that once a tax has been assessed, the Government then has the ability to expeditiously assess and collect the tax, and the taxpayer's only option is to pay any disputed amount and then at a later time sue for a refund. Enochs v. Williams Packing and Navigation Co., 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed. 292 (1962). The provisions of the Act do not encompass suits regarding the procedural collection of the tax, Erickson v. U.S., 780 F.Supp. 733 (W.D. WA 1990), or suits in which the aggrieved party has no access to judicial review. Bob Jones Univ. v. Simon, 416 U.S. 725, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974).

It should be noted that the instant case is not an action brought by the Swanners but a motion in the cause filed by the Swanners in a civil case brought initially by the

Government.[2] It is respectfully urged that this is the only forum for the petitioners to contest the breach of contract by the United States Government of the plea agreement and civil settlement agreement.

II. THE ACTIONS OF THE INTERNAL REVENUE SERVICE IN SEEKING ADDITIONAL TAX AND PENALTIES OVER AND ABOVE THE SANCTIONS IMPOSED IN THE CRIMINAL CASE AND THE CIVIL FORFEITURE CASE VIOLATE THE DOUBLE JEOPARDY PROTECTION AGAINST MULTIPLE PUNISHMENT FOR THE SAME OFFENSE UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND VIOLATE THE PROSCRIPTION AGAINST EXCESSIVE FINES UNDER THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The petitioners respectfully contend that if it is not found that the actions of the Internal Revenue Service violate the memorandum of plea agreement and the stipulation of compromise settlement and court order approving same, then its attempts to assess and collect additional taxes, interest, and penalties violate the double jeopardy protection against multiple punishment for the same offense under the Fifth Amendment of the United States Constitution and violate the proscription against excessive fines under the Eighth

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[2] The Swanners did not contest the case in Tax Court and do not have sufficient funds to pay the tax plus penalties and interest and file suit in Federal Court.

Amendment of the United States Constitution. This argument is offered alternatively and additionally to the first argument above.

Double Jeopardy

In United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed 2d 487 (1989), the Supreme Court addressed whether and under what circumstances a civil penalty may constitute punishment for the purposes of a double jeopardy analysis. The Court affirmed the District Court's holding that a civil penalty many times greater than the government's measurable loss qualified as punishment barred by the Fifth Amendment double jeopardy clause. Specifically, the Court held that "a defendant who already has been punished in a criminal prosecution may not be subject to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution" Id. at 448-449, 109 S.Ct. at 1901-1902. The Court went on to state that a description by the Legislature of a statute as "civil" does not foreclose the possibility that such a statute has a punitive character.

Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937 128 L.Ed 2d 767 (1994), applied the reasoning of Halper to a tax imposed pursuant to Montana's Dangerous Drug Tax Act. The Court recognized that its past opinions opened the door for recognition that a tax may have questionable constitutional validity when it becomes a mere penalty with the characteristics of regulation and punishment. "The prior opinions coupled with Halper's unequivocal statements that labels do not control in a double jeopardy inquiry, indicates that tax is not immune from double jeopardy scrutiny simply because it is a tax." Kurth Ranch 114 S.Ct. at 1946. The Court went to on to evaluate the constitutionality of the "Montana Dangerous Drug Tax",

and focused on whether a "tax for the possession of illegal drugs assessed after the state has imposed a criminal penalty for the same conduct may violate the constitutional prohibition against successive punishments for the same offense." 114 S.Ct. at 1941.

The United States Supreme Court has recently heard argument in a case involving double jeopardy where defendants were indicted for misapplication of bank funds for which they had been previously fined by the Office of Comptroller of Currency. See Hudson v. United States, Supreme Court No. 96-976 argued October 8, 1997. A petition for writ of certiorari was granted to review the opinion of the United States Court of Appeals for the Tenth Circuit in United States v. Hudson, 92 F.3d 1026 (10th Cir. 1996). It is respectfully urged that the plea agreement and stipulation of compromise settlement in the instant case makes this petition even more appropriate for the United States Supreme Court to grant than the petition granted in Hudson v. United States.

Due to the total set of facts herein, the plea agreement, the stipulation of compromise settlement in the civil forfeiture case, the amount sought by the Internal Revenue Service, and the manner in which the amount sought by the Internal Revenue Service was calculated, the actions now taken by the Internal Revenue Service cannot be fairly characterized as remedial but only as punitive and retributive as defined in Halper. Also, under the guidelines of Montana v. Kurth Ranch, it is respectfully contended that the actions taken by the Internal Revenue Service and the amount sought are not rationally related to the damages suffered by the Government. It is urged that the Supreme Court decision pending in Hudson v. United States would be controlling on this issue. The petitioners contend that they are being punished many times over for the same offense and conduct.

Excessive Fines

Not only does the penalty assessed in the present case amount to multiple punishment for the purposes of double jeopardy analysis, but the tax liens and levies by the government also violate the Eighth Amendment protection against excessive fines. The Supreme Court held in Austin v. United States, 509 U.S. 602, 125 L.Ed 2d 488, 113 S.Ct. 2801 (1993) that forfeiture generally, and statutory in rem forfeiture in particular, historically have been understood, at least in part, as punishment. Id. at 2810. This opinion modified the long standing principle that the Eighth Amendment excessive fines clause relates only to the imposition of criminal, rather than civil, sanctions, and instead focused the inquiry on whether the sanctions were punishment.

In the instant case, the Swanners have already paid over $300,000.00 pursuant to the memorandum of plea agreement and stipulated compromise settlement. Additionally Mr. Swanner has paid a fine in the amount of $15,000.00 and served an active sentence of fourteen (14) months. The Internal Revenue Service is now seeking additional tax liability of $189,574.00 ($76,202.00 plus $113,372.00), plus penalties in the amount of $142,180.50 ($57,151.50 plus $85,029.00), plus interest in the amount of $105,983.05 ($54,244.87 plus $51,738.18). It is respectfully urged that the amount sought by the Internal Revenue Service is excessive and constitutionally infirm under the Eighth Amendment.

CONCLUSION

The petitioners have previously been punished in criminal court and civil court for their gambling operation by

fine, forfeiture, and an active prison sentence. To allow the Internal Revenue Service to assess additional taxes, penalties, and interest in violation of the criminal plea agreement and civil stipulation of compromise settlement which were purported to resolve all criminal and civil issues in one universal agreement should not be tolerated. The decisions of the United States District Court for the Eastern District of North Carolina and the United States Court of Appeals for the Fourth Circuit should be reversed. Therefore, the petitioners A.G. Swanner, Jr. and Linda F. Swanner respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted, this the 25TH day of November, 1997.

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ASA G. SWANNER, JR.
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APPENDIX

Page

1. Opinion of the United States Court of Appeals for the Fourth Circuit (8-29-97) 1

2. Opinion of the United States District Court for the Eastern District of North Carolina (1-16-96) 9

3. Jurisdiction; Title 28 U.S.C. § 1254(1) 15

4. Title 18 U.S.C. § 1955 16

5. Title 18 U.S.C. § 981 16

6. United States Constitution, Amendment V 17

7. United States Constitution, Amendment VIII 17

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ASA G. SWANNER, JR.; LINDA F. SWANNER,
Claimants-Appellants,

and

$92,762.34 IN UNITED STATES CURRENCY; VEHICLE VIN #1C2XJ5538LG485466, 1990 CHRYSLER LEBARON CONVERTIBLE AUTOMOBILE, with all appurtenances and attachments thereon; VEHICLE VIN #1G6CD5185H4259884, 1987 CADILLAC SEDAN DEVILLE AUTOMOBILE, with all appurtenances and attachments thereon; TRACT 1 PITT COUNTY LAND, Real property with buildings, appurtenances, and improvements thereto, being more particularly described as follows: One Tract of Real Property, Pactolus Township, Pitt County, NC, Deed Recorded at Book 262, Page 170 of the Pitt County Registry, Being Titled in the name of A. G. Swanner, Jr., and wife, Linda F. Swanner; TRACT 2 PITT COUNTY LAND, One Tract of Real Property, Pactolus Township, Pitt County, NC, Deed Recorded at Book 291, Page 134 of the Pitt County

No. 96-1195

Registry, being Titled in the names of A. G. Swanner; TRACT 3 BEAUFORT COUNTY LAND, One Tract of Real Property, Long Acre Township, Beaufort Township, NC, Deed Recorded at Book 843, Page 171 of the Beaufort County Registry, being titled in the names of A. G. Swanner and wife, Linda F. Swanner; TRACT 4 BEAUFORT COUNTY LAND, One Tract of Real Property, Long Acre Township, Beaufort County, NC, Deed Recorded at Book 860, Page 222 of the Beaufort County Registry being titled in the names of A. G. Swanner and wife, Linda F. Swanner; TRACT 5 BEAUFORT COUNTY LAND, One Tract of Real Property, Long Acre Township Beaufort County, NC, Deed, Recorded at Book 884, Page 294 of Beaufort County Registry, being titled in the names of A. G. Swanner and wife, Linda F. Swanner; TRACT 6 BEAUFORT COUNTY LAND, One Tract of Real Property in Richland Township, Beaufort County, NC, Deed Recorded at Book 885, Page 164 of the Beaufort County Registry, being titled in the names of Asa G. Swanner and wife, Linda Swanner; TRACT 7 BEAUFORT COUNTY LAND, One Tract of Real Property in the City of Washington, Beaufort County, NC, Deed Recorded at Book 922, Page 596

of the Beaufort County Registry. Being Titled in the names of Asa G. Swanner, Jr. and wife, Linda F. Swanner; CHECK 30016070 HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OFFICIAL CHECK, in the amount of $1,796.90 made payable to the Internal Revenue Service, said checks representing the proceeds seized by the IRS/CID in Account Nos. 3020014033, 3020013736, and 3020013728 at Home Federal Savings and Loan Association; CHECK 30016071 HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OFFICIAL CHECK, in the amount of $1,829.25 made payable to the Internal Revenue Service, said checks representing the proceeds seized by the IRS/CID in Account Nos. 3020014033, 3020013736, and 3020013728 at Home Federal Savings and Loan Association; CHECK 30016069 HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OFFICIAL CHECK, in the amount of $575.28 made payable to the Internal Revenue Service, said checks representing the proceeds seized by the IRS/CID in Account Nos. 3020014033, 3020013736 and 3020013728 at Home Federal Savings and Loan Association; CHECK 2512-2388 WACHOVIA BANK AND TRUST OFFICIAL CHECK, in the amount of $7,553.04 made payable to the Internal Revenue Service, said check representing proceeds seized by the

IRS/CID in Account Nos. 8228-088225. 8228-6434427. 8227-062414 and 8821-746532 at Wachovia Bank and Trust: CHECK 01187601 FIRST CITIZENS BANK CASHIER'S CHECK. in the amount of $1,454.53 made payable to the IRS. said check representing the proceeds seized by the IRS/CID in Account No. 440-1122173 at First Citizens Bank: CHECK 26453-51 NATIONS BANK OFFICIAL CHECK. in the amount of $67,477.69 made payable to the regional commissioner of the IRS. said check representing the proceeds seized by the IRS/CID in Account Nos. 02700-005-91948-37. 02700-005-9195254. 02700-005-9410945. 02700-16-4257651. 02700-016-9194586. 02700-016-9195252. 277275129. 277275137. 273241760 and 273389619 at Nations Bank. all of the above Certificate of Deposits and/or bank accounts were held in the names of Asa G. Swanner. Jr.. Linda Faye Swanner. Asa Renee Swanner. Heather F. Swanner. Blackbeard's Restaurant and Lounge and/or The Rebel Lounge and Tavern: TRACT 8 BEAUFORT COUNTY LAND. One Tract of Real Property in the City of Washington. Beaufort County. NC. Deed recorded at Book 943. Page 696 of the Beaufort County Registry. being titled in the Names of Asa G. Swanner. Jr.. and wife. Linda F. Swanner. and any and all proceeds from the sale of

said properties; TRACT 9 BEAUFORT COUNTY LAND, One Tract of Real Property in the City of Washington, Beaufort County, NC. Deed Recorded at Book 943, Page 696 of the Beaufort County Registry, being titled in the names of Asa G. Swanner, Jr., and wife, Linda F. Swanner, and any and all proceeds from the sale of said properties; WACHOVIA BANK OF NORTH CAROLINA, N.A.,

Defendants,

NATIONSBANK OF NORTH CAROLINA, N.A.; HEATHER F. SWANNER; ASA RENEE SWANNER,

Claimants.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Greenville.
James C. Fox, Chief District Judge.
(CA-92-93-4-H)

Argued: June 2, 1997

Decided: August 29, 1997

Before MURNAGHAN and LUTTIG, Circuit Judges, and TILLEY, United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Rudolph Alexander Ashton, III, SUMRELL, SUGG, CARMICHAEL & ASHTON, P.A., New Bern, North Carolina, for Appellants. Stephen Aubrey West, Assistant United States Attorney, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Christopher L. Griffith, SUMRELL, SUGG, CARMICHAEL & ASHTON, P.A., New Bern, North Carolina, for Appellants. Janice McKenzie Cole, United States Attorney, Anne M. Hayes, Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Asa G. Swanner, Jr. was the proprietor of a five million dollar a year gambling business. He was criminally charged with conspiracy to conduct a gambling operation and also had a civil forfeiture action filed against some of the property owned by him and his wife. The Swanners, their attorneys, and the government entered into a written agreement to settle the civil forfeiture action and Mr. Swanner reached a plea agreement in the criminal action. In one provision of the civil settlement, the government agreed to

> [d]ismiss all civil and criminal forfeiture actions regarding the remaining defendant properties in this action and the related criminal action, and to seek no additional civil or criminal forfeiture against these properties based on the facts which form the basis for this civil forfeiture proceeding and the related indictment.

A footnote to this provision added:

> The agreement not to seek additional civil or criminal forfeitures against the defendant properties that are released, pursuant to the terms of this agreement, is limited to the Eastern District of North Carolina, and in no way binds the actions of other federal agencies in this district or others that are unrelated to these forfeiture proceedings, to specifically include the Internal Revenue Service, if any.

When the Internal Revenue Service filed liens against some of the properties for unpaid taxes, the Swanners filed a motion in the forfeiture action alleging a breach of the settlement and plea agreements and seeking an order preventing the Internal Revenue Service from pursuing the liens. The district court denied relief on three grounds, finding: (1) that the Swanners' failure to pay taxes was separate and distinct from operation of the gambling business, (2) that enforcement of tax liens is not a criminal forfeiture, and (3) that, additionally, the Internal Revenue Service had been specifically excluded from the operative provision of the settlement agreement.

On appeal, the United States raises for the first time the jurisdictional bar of the Anti-Injunction statute, 26 U.S.C. § 7421, which prohibits the maintenance of suits "for the purpose of restraining the assessment or collection of any tax." While the statute bars a suit challenging the collection and assessment of taxes, it has been held not to bar "a suit to remove a lien without questioning the entitlement of the government to collect the taxes in some other way." *Harrell v. United States*, 13 F.3d 232, 233 (7th Cir. 1993) (citing *Robinson v. United States*, 920 F.2d 1157, 1159-61 (3d Cir. 1990), and *In re Estate of Johnson*, 836 F.2d 940, 948 (5th Cir. 1988)).

Insofar as the relief sought by the Swanner's* may be read to question whether they owed unpaid taxes and penalties, the Anti-Injunction Act applies since the proper remedy would have been to pay the questioned amount and bring a suit for a refund. Insofar as the relief may be understood as a simple request to declare the liens invalid because of agreements in Mr. Swanner's plea agreement and

*The relief prayed in the motion was to enjoin the government from any further "forfeiture and seizure" of the Swanners' property and to "withdraw" any notices of liens filed on the subject property.

in the civil forfeiture settlement agreement, we agree with each of the district court's findings and affirm on the reasoning expressed in that court's written opinion, *United States v. $92,762.34 in U.S. Currency*, No. 92-93-CIV-4-F (E.D.N.C. Jan. 16, 1996).

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

No. 92-93-CIV-4-F

UNITED STATES OF AMERICA, Plaintiff	)	
	)	ORDER
$92,762.34 IN U.S. CURRENCY; et al., Defendants.	)	

This matter came on for a hearing before the undersigned sitting at Wilmington, North Carolina, on December 27, 1995, on the Motion in the Cause filed December 14 by the claimants Asa G. Swanner, Jr. and Linda F. Swanner. Present were Thomas P. Swaim for the United States and Rudolph A. Ashton and Gary H. Clemmons for the claimants.

The Government filed the complaint in this case July 2, 1992, seeking the forfeiture of various currency and property owned by the claimants. The Government also named Mr. and Mrs. Swanner in an indictment and two superseding indictments filed in 1994 and 1995 charging various gambling offenses. These criminal cases, docket numbers 4:94-CR-56-1-H and 4:94-CR-56-2-H, were assigned to Judge Malcolm J. Howard. On April 10, 1995, the Government entered into a plea agreement with the Swanners in those criminal cases whereby the Swanners agreed not to contest the civil forfeiture in this case, consistent with the terms of a separate stipulation of compromise settlement between the parties. The Government agreed that the United States Attorney for the Eastern District of North Carolina would not further prosecute the defendant

for conduct constituting the basis for the indictment, and that it would comply with all the provisions of the related stipulation of compromise settlement in this case.

Pursuant to the terms of that settlement, the Swanners agreed to the forfeiture of the currency and certain property, and the Government agreed to

> [d]ismiss all civil and criminal forfeiture actions regarding the remaining defendant properties in this action and the related criminal action, and to seek no additional civil or criminal forfeiture against these properties based on the facts which form the basis for this civil forfeiture proceeding and the related indictment.

(Stipulation of Compromise Settlement at 6.) A footnote to this provision reads,

> The agreement not to seek additional civil or criminal forfeitures against the defendant properties that are released, pursuant to the terms of this agreement, is limited to the Eastern District of North Carolina, and in no way binds the actions of other federal agencies in this district or others that are unrelated to these forfeiture proceedings, to specifically include the Internal Revenue Service, if any.

(Id. at 6 n.2.)

On May 26, 1995, the undersigned entered an amended order forfeiting the agreed-upon property. The order included a sentence closely tracking the language of the

first paragraph quoted above. At page 7 the court ordered "that the Plaintiff seek no additional civil or criminal forfeiture against these properties or any others in connection with these claimants, based on the facts which form the basis for this civil forfeiture proceeding and the related indictment." The order did not include the footnote quoted above or any similar language.

The Swanners have now returned to the court with this Motion in the Cause. They allege that, while they have complied with all the terms of the plea agreement and the stipulation of compromise settlement, the Government, through the Internal Revenue Service, has filed federal tax liens in Pitt County and Beaufort County, North Carolina, and has begun certain "forfeiture" proceedings against their property. They claim that the IRS has seized and will continue to seize certain commercial rental fees owed to them, and that the IRS intends to begin foreclosure proceedings on their personal residence and other property. They argue that these actions of the IRS pertain to and result from the same "facts which form the basis for this civil forfeiture proceeding and the related indictment." They argue, a fortiori, that these actions are in violation of the plea agreement, the stipulation of compromise settlement, and the May 26 order of this court. They seek injunctive relief.

Initially, the court must address whether the actions of the IRS challenged here constitute an "additional civil or criminal forfeiture," which the United States expressly agreed not to pursue in the stipulation of compromise settlement. In the court's view, the enforcement of the tax liens by the IRS is not a "forfeiture" at all. A tax lien is a security interest in a taxpayer's property, and the government's right and interest in such property extends no further than the amount of taxes owed by the tax payer, whereas in a true forfeiture the government acquires full title to the entire property as a result

of its being contraband or by reason of the claimant's acquisition thereof through or for the advancement of some illegal activity.

Claimants offered no authority to the contrary either at the hearing or in their written filings. However, a case cited to the court by the government, Thomas v. Commissioner, 62 F.3d 97 (4th Cir. 1995), while not directly on point, lends support to the court's view that the actions of the IRS here do not constitute a "forfeiture." The appellant in that case asserted that the imposition of a tax penalty for his failure to pay taxes on income arising from illegal drug activities violated the prohibition of excessive finds under the Eighth Amendment. In disagreeing with this contention, the court examined the case Austin v. United States, --- U.S. ---, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), in which the Supreme Court held that the civil forfeiture statutes were punitive in nature and thus subject to the strictures of the Eighth Amendment excessive fines clause. The Fourth Circuit drew a sharp distinction between Austin, which "dealt only with forfeiture statutes," and the "tax penalty context" of Thomas. Thomas, 62 F.3d at 102. The court noted that the First Circuit had "declined to apply Austin, a civil forfeiture case, to a civil income tax case," and it declined to do so as well. Id. The court's entire discussion of this point rests on the implied premise that tax penalties are not "forfeitures."

Furthermore, footnote 2 of the stipulation of compromise settlement, quoted above, evidences the parties' understanding that the agreement would not bind the Internal Revenue Service. Claimants emphasize a clause in that footnote provides that the agreement would in no way bind the actions of other federal agencies "*that are unrelated to these forfeiture proceedings,*" and contend that the actions the IRS challenged here certainly are "related to these forfeiture

proceedings;" and thus are precluded by the stipulation of compromise settlement in that case.

Again, the court cannot agree. The forfeiture proceedings in case number 92-93-CIV-4-F relate to the Swanners' illegal gambling activity. The actions of the IRS relate to the Swanners' nonpayment of taxes on the income arising from that activity. While the forfeiture and tax foreclosure proceedings may share a common source, they are independent of one another, as they are based upon distinct factual and legal predicates. See Thomas, 62 F.3d at 99-100 (imposition of a tax penalty for failure to report income derived from drug activity did not violate double jeopardy clause, because taxpayer's failure to report income was discrete from underlying illegal activity).

The court has examined carefully all the submissions of the parties, including the affidavits of counsel as to their understanding of the meaning of the somewhat confusing language in the stipulation of compromise settlement. The court also notes the broader language in footnote 1 of the plea agreement, to the effect that the parties sought through the plea agreement and the stipulation of compromise settlement "a resolution of all criminal and civil issues regarding these defendants." The court believes, however, that the record read as a whole compels the conclusion that the actions of the IRS here challenged are not precluded by the plea agreement in criminal case number 4:94-CR-56-1-H, or by the stipulation of compromise settlement or the court's May 26 order in this case.

Accordingly, this Motion in the Cause is **DENIED** and **DISMISSED** and the Swanners' request for injunctive relief is **DENIED**.

SO ORDERED.

This the 16th day of January, 1996.

JAMES C. FOX
United States District Judge

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

2. By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

UNITED STATES CODE
TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 95 - RACKETEERING

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined no more than $20,000 or imprisoned not more than five years, or both.

UNITED STATES CODE
TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 46 - FORFEITURE

§ 981. Civil forfeiture

(a)

(1) Except as provided in paragraph (2), the following property is subject to forfeiture to the United States:

> Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324(a) of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.

AMENDMENT V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.